SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 23

UNITED STATES OF AMERICA,
Petitioner,

vs.

HERMAN HAYMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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Counsel for Respondent.

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Opinions Below

The opinions in the Court of Appeals on the original hearing (R. 22-43) and on the Government's petition for rehearing (R. 46-51) are reported at 187 F. 2d 456.

Jurisdiction

The judgment of the Court of Appeals was rendered on October 27, 1950 (R. 44) and rehearing was denied on February 26, 1951 (R. 45). The petition for certiorari was filed on March 28, 1951 and was granted on May 14, 1951 (R. 52). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

Questions Presented

1. Whether a motion in the sentencing court under section 2255 of Title 28, which substitutes such a motion for habeas corpus to attack the validity of a federal conviction, is inapplicable in the present case, or "inadequate or ineffective to test the legality of [the prisoner's] detention", entitling respondent under the terms of the section to pursue the remedy of habeas corpus.

2. Whether the motion procedure prescribed by section 2255 so departs from the essential guarantees of habeas corpus that it constitutes a suspension of the privilege of the writ in violation of the Constitution.

Constitutional Provision and Statute Involved

The provisions of Article I, section 9, clause 2, of the Constitution and section 2255 of the Judicial Code will be found in Appendix A, *infra*, pp. 46-47.

The evolution of the text of section 2255 is indicated by provisions of antecedent bills printed in Appendix B, *infra* pp. 47-53.

Statement

The present proceeding was begun on May 11, 1949, when respondent filed in the District Court for the Southern District of California a motion to vacate judgment and sentence and for a new trial (R. 1-4). The motion prayed for an oral hearing and for an order directing the warden of the Federal Penitentiary at McNeil Island, Washington, to have the body of respondent in the court at the time of hearing (R. 4).

The judgment of conviction attacked by the motion had been entered in the same court on January 20, 1947, under a six-count indictment for forging endorsements on government checks and impersonating the payees (R. 2, 8-9). The

ground of the motion now relevant was that respondent was deprived of the effective assistance of counsel, in that without respondent's knowledge his counsel was also attorney for one Juanita Jackson, a principal witness against him and a defendant in a related case (R. 3). The court's records showed that this witness's testimony at respondent's trial was given between the time of a plea of guilty by her and her subsequent sentence (R. 9, 11). The conviction of respondent was affirmed by the Court of Appeals without opinion; the want of effective assistance of counsel was not in issue on that appeal (R. 10).

The motion to vacate judgment was heard by the district judge without ordering the production of respondent and indeed without giving notice to him (R. 8, 24). After taking the testimony of respondent's former counsel and the United States Attorney,[1] the court made findings of fact and conclusions of law and denied respondent's motion on June 9, 1949 (R. 24, 8, 13). On June 23, 1949, respondent filed a notice of appeal in the Court of Appeals (R. 17).[2] During the pendency of the appeal respondent was transferred from McNeil Island to Alcatraz.

The Court of Appeals reversed the order of the District Court, holding that respondent's motion should be dismissed in order that he might file a petition for habeas corpus in the district of his confinement (now the Northern District of California) (R. 44). The construction and validity of section 2255 of the Judicial Code, prescribing the motion procedure, were considered by the court on its own motion. Judge Denman was of opinion that where, as here,

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[1] The testimony in the District Court was not transcribed for the record on appeal and is not now before the Court.

[2] The appeal was timely if governed by the Civil, not the Criminal Rules. For the reasons stated in *Mercado* v. *United States*, 183 F. 2d 486 (C. A. 1), the Civil Rules should be held to apply to appeals under section 2255 of the Judicial Code.

an issue of fact is presented and the prisoner is confined outside the district of the sentencing court, the motion procedure is "inadequate or ineffective" to test the legality of the prisoner's detention under the terms of section 2255 itself (R. 22-36). Judge Stephens, concurring in the result, placed his opinion on the invalidity of section 2255 as a suspension of the privilege of the writ of habeas corpus (R. 36-39). Judge Pope, dissenting, thought that the judgment below should be affirmed (R. 39-43). The Government petitioned for rehearing. In denying the petition, Judges Denman and Stephens each expressed concurrence in the grounds taken by the other (R. 46-49). Judge Pope again dissented (R. 50-51).

Summary of Argument

1. The motion procedure in the sentencing court prescribed by section 2255 is a substitute for habeas corpus, not a mere prerequisite. The procedure, however, is inapplicable by its terms if it is "inadequate or ineffective to test the legality" of the prisoner's detention. Its adequacy must be judged by standards appropriate to a substitute for the Great Writ.

The procedure was designed on the model of coram nobis or a motion for a new trial, and it was assumed that the prisoner had no right to be present at the hearing as on habeas corpus. If, as the Government now suggests, the procedure should approximate that on habeas corpus, it cannot be applied in cases of factual disputes consistently with the design of the section. To bring in prisoners from distant points as a matter of right would subvert the statutory scheme. The statute does not require the prisoner's presence as on habeas corpus; it provides that he need not be produced. It makes no provision for process to bring him in; a provision for nationwide process in an antecedent version of the statute was omitted.

The practice under the section confirms the conclusion that it is not designed to conform to habeas corpus standards. Relatively few prisoners have been produced in comparison with the practice on habeas corpus. The pattern of non-production is not significant where only issues of law are raised by the movant's papers; it is of great moment where, as here, the prisoner ought to be produced if the remedy is to be adequate. In such cases the presuppositions of the scheme are untenable and it becomes inapplicable.

The motion procedure is not only inapplicable but would be inadequate, since process extending outside the district of the sentencing court is not authorized by the habeas corpus legislation, the "all writs" section, or section 2255 itself. A concession on rehearing in the Court of Appeals that respondent is entitled to be present at the hearing came too late to make the remedy adequate. In any event, the right to be present cannot be made to depend on the discretion of the Government or of the sentencing court.

2. If the motion procedure is held to be applicable in the case at bar, it would constitute a suspension of the privilege of habeas corpus in violation of the Constitution. It is not true that the writ was unavailable at common law to persons convicted by courts of general criminal jurisdiction. The misconception is dual: that the English Act of 1679 was coextensive with the common-law writ and that it made such an exclusion. The latter misconception may stem from an erroneous reading of the punctuation in the Act; in any event, the provisions in question dealt with bail for untried prisoners and left convicted persons wholly to the common-law writ, under which most applications for habeas corpus are brought in England. Nor does the power to make a factual inquiry depend on statutory grant. The basis for a factual inquiry is particularly strong where the prisoner is not being held for trial and where consequently there would be no anticipation of the function of a jury.

Our own Act of 1867 is not the source of the authority to examine into the constitutional validity of a Federal trial on habeas corpus. In *Ex parte Siebold*, 100 U. S. 371, reviewing the constitutionality of a Federal criminal statute on habeas corpus, Mr. Justice Bradley referred not to the Act of 1867 but to Bacon's Abridgment, Chief Baron Gilbert, and Chief Justice Vaughan's venerated opinion in Bushell's Case. The writ is available, without the aid of statute, wherever a man is restrained of his liberty for a cause for which no man ought to be imprisoned or by a process whereby no man ought to be convicted.

The motion procedure, in its cumulative effect, destroys the vitals of habeas corpus: prompt and peremptory production of the prisoner where a disputed issue of fact is raised; opportunity for bail on appeal after discharge of the writ or of the prisoner; opportunity to make a successive application to another judge or court in an effort to arrive at the truth.

The abuses of irresponsible petitions are met by procedural provisions outside of section 2255. That section tends rather to encourage dishonest applications by holding out the premium of a more extended journey from prison if the prisoner's allegations are sufficiently impressive. To invalidate the section would not produce untoward results but would, instead, give reassurance that when faced with an erosion of the liberty of the citizen the Court will set up the bulwark of *obsta principiis*.

ARGUMENT

I

The Remedy by Motion under Section 2255 Is Inapplicable in This Case.

This case presents important questions concerning the construction and validity of section 2255 of Title 28 of the

United States Code, *infra*, p. 46, added in the revision of 1948. The section provides for a motion in the sentencing court to vacate a criminal sentence or judgment at the instance of a prisoner convicted by a Federal court, on grounds that would render the judgment or sentence vulnerable to collateral attack. The most critical portion of the section is the final sentence:

> "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

Respondent's motion in the sentencing court raised issues calling for his presence at a hearing, as the Government belatedly conceded on motion for rehearing in the Court of Appeals, eighteen months after the prisoner's motion was filed. On petition for a writ of habeas corpus, respondent would have had the undoubted right to be produced in court with the utmost expedition; the writ operates, to borrow Francis Thompson's refrain, with "deliberate speed, majestic instancy." The Government insists that respondent must start again in the sentencing court. The court below held that the remedy by motion in the sentencing court under Section 2255 of the Judicial Code was, in the language of the final sentence of the section itself, "inadequate or ineffective to test the legality of his [respondent's] detention," and that consequently the appropriate remedy was habeas corpus in the district of imprisonment pursuant to the saving clause of section 2255. In so holding, we submit, the court was right. On this branch of the argument we are dealing only with a case, like that at bar, in which the factual issues raised by the application and response make

it necessary that the prisoner be present at a hearing, as on habeas corpus. If our position is sound, it will become unnecessary to consider the more pervasive constitutional difficulties raised by section 2255, discussed under Point II, *infra*.

A. SECTION 2255 IS DESIGNED AS A SUBSTITUTE FOR, NOT A PREREQUISITE TO, HABEAS CORPUS; AND ITS STANDARD OF ADEQUACY OR EFFECTIVENESS MUST BE CONSTRUED ACCORDINGLY.

In construing the final sentence, or saving clause, of section 2255 it is important to appreciate the relation between the motion procedure and the availability of habeas corpus. If the motion procedure is only a prerequisite to habeas corpus the adequacy or effectiveness of the former may be judged by one set of standards; if it is a substitute, precluding resort to habeas corpus, the test will be more exacting. At the last term the Court was able to avoid certain consfitutional problems concerning military review of courts martial by noting that the supplemental proceedings in question merely preceded, and did not supplant, habeas corpus. *Gusik* v. *Schilder*, 340 U.S. 128. The Court, by way of analogy, referred to the rule of exhaustion of state remedies before resort to federal habeas corpus, now codified in section 2254 of the Judicial Code. Although the Government's brief referred also to section 2255 as an analogy, the Court refrained from citing this section.

Other courts, as well as commentators, have been less careful, and their premise that the motion under Section 2255 leaves intact the later availability of habeas corpus could not fail to affect their conclusions regarding the adequacy and validity of the motion procedure. In *Martin* v. *Hiatt*, 174 F. 2d 350 (C. A. 5), the court remitted the prisoner to the motion procedure, stating (p. 352): "Then, if such a petitioner's effort were an ineffective test or if he failed to succeed in the court that had cast the yoke upon

him, the right of appeal would still be his; and if either or both of these efforts should prove inadequate, then he should still have access to the great, age-old, and grossly abused writ of habeas corpus ad subjiciendum." The statute, the court concluded, provides that "an attack upon a final judgment of conviction by a Federal court in a criminal case ought usually to be made *first* in the court that rendered such judgment." (Italics added.) In *Weber* v. *Steele*, 185 F. 2d 799 (C. A. 8), another Court of Appeals took the same view (p. 800): "The purpose of Section 2255 was to require a federal prisoner to exhaust his remedies in the courts of the District and Circuit in which he was convicted and sentenced, and to apply to the Supreme Court, on certiorari from a denial of such remedies, before seeking release on habeas corpus. This means that he must exhaust all the ordinary remedies available to him before applying for an extraordinary remedy." Similarly, Judge Underwood has said: "The question here is, does Code Section 2255 place such restrictions upon the use of the writ as to amount to an unconstitutional suspension of it, or, are such restrictions merely permissible requirements of procedure which do not suspend but only temporarily delay its use for a reasonable time for a justified purpose? When properly construed, I think the latter alternative statement is the proper construction." *St. Clair* v. *Hiatt*, 83 F. S. 585 (N. D. Ga.). See also *Wong* v. *Vogel*, 80 F. S. 723 (E. D. Ky.); *Waldon* v. *United States*, 84 F. S. 449 (E. D. Ill.). Indeed, the chief draftsman of the revision of Title 28 appears to take the same view: "Probably the strongest argument for the constitutionality of the statute is found in the long line of cases holding that a prisoner before resorting to habeas corpus must exhaust all his other procedural remedies. The statute is a substitute for the writ of error coram nobis, not for the writ of habeas corpus. It clarifies and restates in simple terms the procedure for correcting an illegal sentence before

a writ of habeas corpus may be sought." Barron, in 4 *Fed. Pract. and Proc.* 311 (1951).

Such a reading of Section 2255, making it simply a prerequisite to habeas corpus, overlooks the controlling language of the final sentence. Habeas corpus is not to be entertained, not only when the prisoner has failed to apply for relief by motion in the sentencing court, but where "such court has denied him relief," unless, of course, the remedy by motion is "inadequate or ineffective to test the legality of his detention." If the remedy by motion is adequate as a test, though it prove unsuccessful, recourse to habeas corpus is absolutely precluded.

The legislative background of the section and its purpose are confirmatory of this reading of the text. The use of a motion procedure to challenge a criminal sentence or judgment is by no means an innovation of the 1948 revision of the Judicial Code. Where the portion of the sentence being served is valid, an attack on a portion claimed to be invalid has not been cognizable on habeas corpus, and the prisoner has been permitted to make the challenge, on issues of law, in the sentencing court. Cf. *McNally* v. *Hill*, 293 U. S. 131; *Holiday* v. *Johnston*, 313 U. S. 342. The Advisory Committee on Rules of Criminal Procedure proposed a motion, without time limit, for vacating sentence or judgment on the ground of constitutional infirmity in the conviction as well as of newly discovered evidence; but this proposal was not embodied in the Rules as promulgated. See Report of Advisory Committee, 1944, Rule 35; Second Preliminary Draft, Federal Rules of Criminal Procedure, 1944, Rule 35; cf. *id.*, Preliminary Draft, 1943, 256-57 (minority views). This proposal, however, stopped short of superseding habeas corpus by the motion.

At the same time the Judicial Conference addressed itself broadly to problems of practice in habeas corpus, under the impetus of an increased case load of applications for the

writ by federal prisoners, many of which were felt to be frivolous and repetitious. See *Dorsey* v. *Gill*, 148 F. 2d 857 (App. D. C.); Parker, *Limiting the Abuse of Habeas Corpus*, 8 F. R. D. 171. In 1942 a committee was appointed, composed of Judge Parker as chairman, and Judges Kimbrough Stone, Albert Lee Stephens, Vaught, Underwood and Wyzanski. See Report of Judicial Conference, 1942, p. 18; *id.* 1943, p. 22; *id.* 1944, p. 22; 1945, pp. 3, 28; 1946, p. 21; 1947, p. 17. In 1945 bills prepared by the committee and approved by the Judicial Conference were introduced in the Senate and House. H. R. 4232 and 4233, S. 1451 and 1452, 79th Cong. 1st sess. The first bill in each house dealt with procedure on habeas corpus; the second, the precursor of Section 2255, with jurisdiction in habeas corpus to review convictions by state and federal courts, respectively. See Appendix, *infra*, p. 47. It is clear that the motion procedure was designed as a substitute for habeas corpus under the language of these bills. In this respect no change was made in the bill introduced in 1946 which superseded the 1945 bill. H. R. 6723, 79th Cong., 2d sess., Appendix, *infra*, p. 50. Meanwhile the revision of the entire Judicial Code was in process, and there was consultation between the revisers, representatives of the Department of Justice, and representatives of the Judicial Conference. See Govt. Br. App., pp. 121-126. With some changes the proposals of the Conference bills were taken into the revision of the Code. See H. R. 7124, 79th Cong. 2d sess., Appendix, *infra*, p. 52. Again the function of the motion as a substitute for habeas corpus is maintained, in the final sentence. Nowhere is there any indication of the weight to be given to a denial of the motion if it could be followed by a petition for habeas corpus. Indeed, it would have been extraordinary if the draftsmen, concerned with what appeared to be a mountain of habeas corpus petitions, had simply succeeded in piling Olympus on Ossa by affording

Federal prisoners an additional, preliminary, remedy in a distant court.

As a substitute, then, for the Great Writ, the motion procedure must be judged in its "adequacy" by standards appropriate to such a displacement. In this Court at this time it is unnecessary to elaborate the historic and cherished role of habeas corpus as the great vindicator of human liberty against restraint which is fundamentally unsupportable. "The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom." *Ex parte Yerger*, 8 Wall. 85, 95. From Marshall's day to our own, statutes affecting habeas corpus have been construed with the utmost regard for the procedural rights of the prisoner. Implications will not be indulged which are restrictive of those rights. *Ex parte Bollman*, 4 Cr. 75; *Ex parte Yerger, supra; Walker* v. *Johnston*, 312 U. S. 275; *Holiday* v. *Johnston*, 313 U. S. 342. See also *People ex rel. Tweed* v. *Liscomb*, 60 N. Y. 559; *Servonitz* v. *State*, 133 Wis. 231; *Secretary of State for Home Affairs* v. *O'Brien* [1923] A. C. 603. In that spirit we turn to consider the "adequacy" of the remedy by motion in the case at bar.

B. THE MOTION PROCEDURE WAS NOT DESIGNED TO APPLY WHERE THE PRISONER HAS A RIGHT TO BE PRESENT AS ON HABEAS CORPUS; THE PRACTICE UNDER SECTION 2255

The Government's petition for certiorari, comparing the motion procedure with habeas corpus, states (p. 14): "Basically, only the forum in which the proceedings are brought is changed." We do not so read the statute, its genesis and purpose, or the practice under it.

Had the draftsmen of section 2255 and its antecedent versions meant simply to change the forum for habeas corpus, it would have been perfectly easy so to provide. The only reference to habeas corpus in the description of the procedure on the motion occurs in reference to appeals:

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus." The draftsmen could have made a similar incorporation by reference had they been minded to adopt habeas corpus procedure.

Did the draftsmen make provision for the right of the prisoner to be brought in as on habeas corpus? They did not. Instead, they provided: "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing." Did they provide process for producing the prisoner from a distant place of confinement? They did not. Instead, they omitted a provision that had been included in an antecedent bill, H. R. 6723, 79th Cong. 2d sess., Appendix, *infra*, p. 52; "The process of the court wherein such motion is filed may be served at any place within the jurisdiction of the United States." The contrast between the procedure on the motion and on habeas corpus is reflected in the original draft of the section, as presented to the Judicial Conference by its committee. The saving clause provided that habeas corpus would not be available to a Federal prisoner authorized to invoke the motion procedure

> "unless it appears that it has not been or will not be practicable to have his right to discharge from custody determined on such motion *because of the necessity of his presence at the hearing, or for other reasons.*" (Report of the Judicial Conference, 1943, p. 24.) (Italics added.)

What, then, was the model on which the motion procedure was constructed? The answer is plain. The model was the writ of error *coram nobis* or the motion for a new trial. So states the Reviser's Note to section 2255:

> "This section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis. It provides an expeditious remedy for correcting erroneous sentences without resort to habeas

corpus. It has the approval of the Judicial Conference of the United States. Its principal provisions are incorporated in H. R. 4233, Seventy-ninth Congress."

So states the principal draftsman of the Revision:

> "The statute is a substitute for the writ of error coram nobis, not for the writ of habeas corpus. It clarifies and restates in simple terms the procedure for correcting an illegal sentence before a writ of habeas corpus may be sought." (Barron, in 4 *Fed. Pract. and Proc.* 311).

So states Judge Parker: "This motion is in the nature of an application for a writ of error coram nobis and is merely declaratory of existing law." 8 F. R. D. 171, 175, citing *Bell v. United States*, 129 F. 2d 290 (C.A. 5), and *Barber v. United States*, 142 F. 2d 805 (C.A. 4).[3]

The memoranda prepared and circulated for the Judicial Conference contain similar statements. See Govt. Brief App. 93 ("in the nature of a writ of error coram nobis"); *id.* 167 ("the question as to the constitutional validity of the trial should be raised in the trial court on motion in the nature of the old writ of error coram nobis"); *id.* 171 ("in the nature of a writ of error coram nobis").

Not only were *coram nobis* and the motion for a new trial the models. It was apparently assumed that the applicant's presence was not required on either of these procedures and was therefore not required on the substituted motion under section 2255.

Insofar as the motion procedure is applied to issues that would not call for the prisoner's presence on habeas corpus, this feature raises no problem. Motions to correct or reduce sentence, motions resting on allegations that are contro-

[3] It will be recalled that the survival of *coram nobis* in the Federal courts had been extensively argued, but not settled, in *Wells* v. *United States*, 318 U. S. 257.

verted by the record, motions resting on an unsound legal contention,—all can be disposed of without bringing in the prisoner. Compare *Holiday* v. *Johnston*, 313 U. S. 342; *United States* v. *Lynch*, 159 F. 2d 198 (C. A. 7); *Berg* v. *United States*, 176 F. 2d 122 (C. A. 9); cf. Rule 43, Federal Rules of Criminal Procedure (presence of defendant not required at reduction of sentence under Rule 35). Thus there is substantial scope for the employment of the motion procedure.

But as applied to disputed issues of fact, the assimilation of the procedure to *coram nobis* and motions for a new trial was crucial. The assumption was that on *coram nobis* the applicant's presence at the hearing was not necessary. Judge Parker stated his understanding in 1944, while serving as chairman of the Judicial Conference Committee:

> "Whether the motion is treated as in the nature of a petition for writ of error coram nobis under the old practice or as a motion for a new trial, it is perfectly clear that appellant had no constitutional right to be present at the hearing of the motion and cannot complain because the Court refused to order that he be brought from prison and produced at the hearing. Such a hearing is in no sense a part of the criminal trial at which the Constitution requires the presence of the accused. As on the hearing of an appeal or writ of error in a higher court, what is under investigation on such motion is, not the guilt or innocence of the accused, but the validity or regularity of the proceedings attending his trial." *Barber* v. *United States*, 142 F. 2d 805, 806 (C. A. 4).

This understanding was broadly shared, both before and after the effective date of section 2255. Contrasting a motion procedure (raising the issue of no competent waiver of counsel) with habeas corpus, the court in *Cuckovich* v. *United States*, 170 F. 2d 89, 90 (C. A. 6) observed: "While appellants might have been entitled to be present, to testify,

and to cross-examine witnesses at a hearing in an independent habeas corpus proceeding, they do not have such a right in a hearing on a motion made after judgment in the original proceeding." And see *Berg* v. *United States*, 176 F. 2d 122, 124 (C.A. 9): "But the writ of coram nobis, which is crystallized in the statute, was intended to afford relief against a void sentence. Since it was an appeal to the trial judges on the record, there was no personal appearance of the movant required." See also *United States* v. *Mahoney*, 43 F. Supp. 943 (W. D. La.).

This assumption regarding *coram nobis* was thoroughly exploded in a very recent decision of the New York Court of Appeals, in a strong opinion by Judge Desmond. *People* v. *Richetti*, 302 N. Y. 290 (holding that the prisoner has a right to be produced at a hearing on the motion, raising an issue of fact concerning offer of counsel). The older books are quite explicit in asserting the right, on *coram nobis*, to a formal trial on the disputed issue of fact; indeed, where the original judgment was based on a jury verdict, the trial on *coram nobis* was also to a jury. See Note to *Jaques* v. *Caesar*, 2 Saund. 100; 1 Archbold, *Practice* 281; 2 Tidd, *Practice* 1121-22 (3d ed. 1803); T. W. Powell, *Appellate Proceedings* 111-112 (1872); *Saunders* v. *State*, 85 Ind. 318.

The supposed analogy to motions for a new trial also falls. While it may be conceded that the movant's presence is not required on such a motion, the comparison is not apt, for the grounds asserted on a motion for new trial do not touch those basic defects in the criminal proceeding that are the subject of habeas corpus or the new procedure under section 2255.

The views of each member of the Judicial Conference or its committee on this problem are not known.[4] Quite possibly some of the members recognized from the begin-

[4] A statement of Judge Stone is discussed *infra*, p. 18.

ning that the necessity for production of the prisoner was more extensive than these analogies indicated. In that event, in applying the section they would presumably have given correspondingly less scope to the motion procedure and more to the remedy on habeas corpus. Whether this result was foreseen or follows from a present recognition that basic assumptions underlying the section are untenable, the consequence is the same: the motion procedure yields to habeas corpus where disputed issues of fact entitle the prisoner to be brought in. Otherwise, as we have suggested, the motion would be in substance a transfer of habeas corpus to the distant sentencing court—a result plainly not contemplated or desired.

In this light, it is not surprising that the District Court in the present case proceeded without the presence of the prisoner. The whole atmosphere of section 2255 is congenial to that practice. The error of the District Court was not in its understanding of the motion practice but in its failure to discern that in a case where the prisoner has a right to be brought in as on habeas corpus the procedure is "inadequate or ineffective" and should yield to habeas corpus. The meaning of "inadequate or ineffective" will depend on the statutory privilege of the prisoner to be produced on the motion, in a kind of inverse relation—the narrower the privilege on the motion, the more inadequate the remedy.

What is the intended criterion of this privilege under section 2255? We have sought to show that it was the supposed analogy of coram nobis and motions for a new trial, and that since this standard is untenable, as the Government would agree it is, the inadequacy of the remedy is greater than some, at least, of its sponsors recognized. To make the standard the same, or approximately the same, as that for habeas corpus would strengthen the adequacy of the remedy but would require a major judicial operation on the statute.

The studiously contrived motion procedure would be converted into a mere change of venue; and prisoners who would otherwise be transported across San Francisco Bay from Alcatraz to the District Court could look forward to extended, even transcontinental journeys.

The Government's suggestion (Brief 58) is that the prisoner must be produced wherever substantial factual issues are presented on which the testimony and credibility of the prisoner is important, absent special circumstances. This test is surely broader than that envisaged by Judge Parker, so that it disturbs the contemplated balance of remedies, and yet not broad enough to be truly adequate. Would not a prisoner's presence be required at a hearing on the issue of mob domination of a trial, or knowing use of perjured testimony by the prosecution, where the prisoner could be of assistance in eliciting the facts even though he did not expect to be a witness? The Government's standard is avowedly based on the assumption that on habeas corpus evidence outside the record became admissible only by virtue of statute (Brief 57)—an assumption which we discuss *infra*, pages 34-35.

Moreover, it is not clear what is meant by the "special circumstances" that in the Government's view would dispense with the prisoner's presence. This seems to be an echo of a suggestion by Circuit Judge Stone, who would have had the habeas corpus judge weigh the danger, cost and inconvenience of production. This memorandum, quoted at length in the Government's brief (pp. 27-29), was apparently not submitted to the full Judicial Conference or to its committee (Govt. Br. App. 121). The standard suggested was not adopted by Judge Parker in his own explanation after he resumed the committee chairmanship; in submitting the bill to all Federal judges for comment, he simply stated, on this point: "The power to grant relief under habeas corpus where injustice would otherwise

result is carefully preserved." (Govt. Br. 172.) Finally, Judge Stone was seeking to interpret a clause not identical with that adopted; at that time it read: "unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons." See H. R. 4233, 79th Cong. 1st sess., Appendix, *infra*, p. 49.

The practice under section 2255 is far from conforming to standards that would be followed on habeas corpus. The available data indicate, what was to be expected, that in fact prisoners have not been brought before the sentencing court as they would be before a habeas corpus court. Statistics compiled by the Administrative Office of the United States Courts show that of 76 motions reported to it as filed and disposed of under section 2255 in the year 1948-49, in only 12 instances were the prisoners produced for a hearing.[5] A further analysis, in terms of individuals instead of motions (i.e., eliminating multiple motions by the same prisoner) shows that of 67 prisoners filing these motions only 6, or 9 percent, were afforded a personal hearing. While the full significance of these figures would

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[5] The figures are taken from Speck, *Statistics on Federal Habeas Corpus*, 10 Ohio St. L. J. 338 (1949) (Tables 8 and 11), and from a supplementary memorandum of October 3, 1951, furnished to counsel on both sides, prepared by Mr. Speck in the Administrative Office of the United States Courts. A copy of the memorandum will be filed with the Clerk. Grateful acknowledgement is made to Mr. Speck and to the Chief of the Division of Procedural Studies and Statistics and the Director of the Administrative Office.

The number of motions filed is actually greater than these figures show, since they are based on reports from Clerks who are directed to, but do not always, docket motions under section 2255 as separate proceedings. Where such motions are docketed under the original case they are not separately reported; this circumstance should not affect the validity of the ratio shown between total motions and presence of the prisoner; if anything, the summary dispositions may be understated because not docketed as a new proceeding.

require an intensive study of the grounds asserted in the motions, it appears from the descriptive information furnished by the clerks of the district courts in transmitting the data that most of the motions raised issues of fact (such as want of competent waiver of counsel) meriting a hearing.[6] These figures should be compared with those for habeas corpus applications. In the five principal districts for habeas corpus applications by Federal prisoners, during 1941-42, of a total of 233 cases the writ was issued and a hearing on the facts was held in 102 cases, or 44 percent. During the period 1939-48, of the non-deportation habeas corpus cases involving Federal custody, an annual average of between 30 and 40 percent were decided after trial. The disparity between the procedures is striking.

The figures furnished to the Government by United States Attorneys (Govt. Br. App. 187-197) show a thin trickle of cases in which the prisoner was produced on the motion, though none at all in some districts, including the Southern District of New York. The figures appear particularly meagre when it is remembered that they cover the entire three-year period since the section became effective.

Our conclusion is that in design and execution the motion procedure is not governed by standards approximating those on habeas corpus, and that if such standards must prevail, as the Government apparently concedes, the motion procedure is inapplicable.

C. THERE IS NO PROCESS FOR BRINGING RESPONDENT BEFORE THE SENTENCING COURT

Not only is the motion procedure inapplicable; it is inadequate because the sentencing court has not been given authority to order respondent brought in from a prison outside the district.

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[6] Based on an inspection of the data furnished by the Clerks.

Obviously a mere subpoena is of no avail to bring a prisoner before the court. See 8 Wigmore, *Evidence* Sec. 2199 (3d ed. 1940). Hence it seems unnecessary to decide, in this connection, whether the motion procedure is governed by the Federal Civil Rules (No. 45(e)) limiting the territorial scope of subpoenas to the district or one hundred miles of the place of trial, or by the Criminal Rules (No. 17(e)) authorizing service at any place in the United States. It is hardly possible, in any event, that Rule 17 of the Criminal Rules would be applicable, coming as it does under the head of "Arraignment and Preparation for Trial."

It is fundamental that the process of a district court does not extend beyond the district unless Congress has made provision for such extension. *Robertson* v. *Railroad Labor Board*, 276 U. S. 619, 622; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 467. Three possible statutory bases for such authority must be considered: the habeas corpus legislation; the "all writs" section; and Section 2255 itself.

1. *The Habeas Corpus Legislation*

This legislation, limiting courts to issuance of the writ in cases "within their respective jurisdictions," precludes issuance of the writ *ad subjiciendum* where the prisoner is confined in another district. *Ahrens* v. *Clark*, 335 U. S. 188. While the Act of February 5, 1867, which contained the limiting words was directed specifically to the writ *ad subjiciendum*, 14 Stat. 385, the writ *ad testificandum* is subsumed under the same words in Title 28, Section 2241. If it be argued that the limiting words apply only to the commencement of a proceeding and not to subsequent steps in a cause which was properly anchored at the outset, the answer may be found in decisions antedating *Ahrens* v. *Clark*, holding that jurisdiction is lost when in ordinary course the prisoner is removed outside the district. *United States ex rel. Innes* v. *Crystal*, 319 U. S. 755; *cf. Ex parte Endo*, 323

U. S. 283. Actually the impediment in the present case is more fundamental than in the *Ahrens* case. There, the district court admittedly had jurisdiction over the ultimately responsible custodian, the Attorney General; the only question was whether the prisoner must also be confined in the district to warrant issuance of the writ. Here, neither the custodian nor the prisoner is within reach of process within the district.

2. *The "All Writs" Section*

It has been held that the authority conferred on district courts by Section 1651 of Title 28 (formerly Section 262) to grant all writs necessary in aid of their jurisdiction is a characterization of the process, not a grant of extraterritorial power. *Mitchell* v. *Dexter,* 244 Fed. 926 (C. A. 1). Recently this limitation has been acknowledged in its specific application to process in the nature of a writ of habeas corpus *ad prosequendum. Phillips* v. *Hiatt,* 83 F. Supp. 935 (D. Del.); see also *United States* v. *Coles,* 88 F. Supp. 150 (D. Ore.)

Of special significance is the fact that shortly before the enactment of Section 2255 doubt was expressed in noteworthy quarters that process was available to bring in a prisoner from outside the district for a hearing of a motion to vacate his judgment of conviction. In 1944, Judge Parker, who was then serving as chairman of the committee appointed by the Judicial Conference which drafted the legislative precursors of Section 2255, rejected a prisoner's request to be produced in those circumstances, quoting the following statement by Judge Sibley in *Bell* v. *United States,* 129 F. 2d 290, 291 (C. A. 5): "The refusal to do it was well within the court's discretion, assuming that by some writ it could have been accomplished." *Barber* v. *United States,* 142 F. 2d 805 (C. A. 4). The *Bell* and *Barber* cases were cited later by Judge Parker as reflecting the law of which section 2255 is declaratory. See p. 14, *supra.*

3. *Section 2255*

Against this background of denial and doubt, under both the habeas corpus and "all writs" provisions—a background neither remote nor obscure—it would be natural for sponsors of new legislation who wished to assure power to produce a distant prisoner to confer that power in express terms. The evolution of the text of Section 2255 is revealing in this regard. The first bill sponsored by the Judicial Conference contained no provision on process. See H. R. 4233, 79th Cong. 1st sess., Appendix, *infra*, p. 47. In the next version, however, such a provision was included: "The process of the court wherein such motion is filed may be served at any place within the jurisdiction of the United States." H. R. 6723, 79th Cong. 2d sess., Appendix, *infra*, p. 52. This critical sentence was eliminated from the bills on revision of the Judicial Code. H. R. 7124, 79th Cong. 2d sess., Appendix, *infra*, p. 52.

Not only was a provision for process outside the district eliminated. There was inserted a provision that "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing." H. R. 7124, 79th Cong. 2d sess., Appendix, *infra*, p. 53. Thus every encouragement was given to the district courts to proceed despite the inability of the prisoner to be present.

It is not surprising, therefore, that the same doubt of the court's power to order a distant prisoner produced, which we noted prior to the enactment of Section 2255, has been repeated by Judge Parker after the enactment: ". . . but, assuming without deciding that the judge had power to enter an order that he be produced, it is perfectly clear that the judge was acting well within his discretion in refusing to do so." *Carvell* v. *United States*, 173 F. 2d 348 (C. A. 4).

The practice of producing a prisoner for resentencing in the criminal court after an order by a habeas corpus court

so requiring is not apposite. The habeas corpus court could order the prisoner released unless the Government produces him in the sentencing court.

Nowhere is there any affirmation that Section 2255 conferred additional power on the district courts. As we have seen, the section is authoritatively described as a clarification of existing law, making certain the power to entertain a motion in the nature of a motion for a writ of error coram nobis.

D. IF THE PRISONER'S PRESENCE CAN BE EFFECTED BY A DISCRETIONARY ACT OF THE GOVERNMENT OR THE DISTRICT COURT, SUCH A PROCEDURE IS INADEQUATE.

If, contrary to our contention, it is concluded that section 2255 does contemplate the presence of the prisoner in the sentencing court as on habeas corpus, there remains the problem of the means to effect that presence. We have argued that there is no basis for finding authority to issue process to secure the production of a prisoner held outside the district. We shall now consider the adequacy of expedients which have been suggested and to a limited extent employed for this purpose.

The first expedient is the voluntary production of the prisoner by the Government. It may be doubted whether the Government's concession in the present case, that the respondent has a right to be present, is not irrelevant. Even if the concession carries the implication that, absent some legal process, the Government will nevertheless produce the prisoner, it is submitted that the concession comes too late. What is relevant is the adequacy of the motion procedure as of the time of the application of the prisoner for vacation of judgment. If the Government makes no offer at that time to produce him, and the district court dismisses his motion with leave to file a petition for habeas corpus elsewhere, must he nonetheless appeal from the dis-

missal, and apply to this Court for certiorari, on the chance that at some point the Government will consent to bring him before the sentencing court? And if the prisoner initiates his action by way of habeas corpus rather than by motion, and the habeas corpus court is confronted with the question of adequacy of the motion procedure, must the court invariably remit the prisoner to the latter procedure because the Government may choose at some stage to concede the right to be present? Was it not contemplated that a habeas corpus court could determine the adequacy of the motion procedure at the outset of the prisoner's application?[7] While the discretion of a tribunal may sometimes have to be invoked before a remedy can be said to be inadequate (cf. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337), it is a wholly different matter to require that the discretion of an adverse party be invoked and pursued. There is no more reason for insisting on such extended pursuit of executive discretion of a jailor than there is of requiring resort to the discretion of a censor. Compare *Schneider* v. *State* (*Town of Irvington*), 308 U. S. 147.

Moreover, even if the concession of the Government is relevant, an offer to produce the prisoner is not an adequate substitute for the court's power to compel his production. It is of the essence of the Great Writ that the liberty of the subject does not depend on the amiability of executive officials. It is not an if-it-please-your-majesty sort of remedy. It is a writ of right, not of grace. 3 Bl. Comm. 132-33; Bac. Abr. Habeas Corpus, B. 3; Church, *Habeas Corpus*, sec. 87. It must be remembered that although it is a judicial conviction that is attacked under section 2255, in significant instances it is the conduct of the prosecuting arm that is in question; and section 2255 evidences no purpose

[7] Note that section 2255 says "is," not "has been," inadequate, and permits *habeas corpus* in that case where the prisoner "has failed to apply" by motion to the sentencing court.

to introduce complicating differentiations based on the nature of the constitutional vice in a conviction. The fact that relations with the executive branch are happily cooperative should not obscure the function of habeas corpus or its substitutes in vindicating the rule of law in time of stress. We are not speaking of a time of total collapse of civilian authority (cf. *Ex parte Merryman*, 17 Fed. Cas. 144), but of the tensions that can be expected to beset a functioning legal order. Unilateral disarmament in a time of harmony may bring regrets in a less happy season.

We turn to the possibility that the court itself has power to require the production of the prisoner, by issuing a writ of habeas corpus *ad testificandum*, despite the considerations that, in our submission, negative this power. See p. 21, *supra*. The issuance of such a writ is at best discretionary, and in cases not arising under section 2255 the courts have taken into account the cost and inconvenience of transporting the prisoner, especially where production is sought at Government expense. *Neufield* v. *United State*, 118 F. 2d 375, 385 (App. D. C.); *Gilmore* v. *United States*, 129 F. 2d 199, 202 (C. A. 10); *Murray* v. *United States*, 138 F. 2d 94, 96 (C. A. 8); *Bugg* v. *United States*, 140 F. 2d 848, 850 (C. A. 8). This discretionary power, if it exists under section 2255, is not an adequate substitute for the duty to order the prisoner to be produced. This Court has held unconstitutional state statutes which failed to prescribe a duty of notice and hearing, even though notice and opportunity to be heard were in fact afforded in the particular case. *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413; *Wuchter* v. *Pizzutti*, 276 U. S. 13, and cases there cited. Surely a statute touching the most fundamental liberty of the person is entitled to be judged by standards not less exacting than those applied to the procedure in stock assessments or negligence cases.

II

If Applied in the Present Case Section 2255 Would Be an Invalid Suspension of the Privilege of the Writ of Habeas Corpus.

A decision that the motion procedure under section 2255 is inapplicable in the case at bar, for the reasons set forth in Point I of this brief, would render unnecessary a decision of the constitutional issue. If that issue is faced, its gravity is indicated by the fact that two Circuit Judges in the present case, including one who was a member of the committee of judges which considered the problem of habeas corpus, have ruled section 2255 unconstitutional; that another Circuit Judge has reached the same conclusion if the motion procedure is employed as a substitute for habeas corpus (Huxman, J., dissenting in *Barrett* v. *Hunter*, 180 F. 2d 510, 516); and that a number of other judges, as well as the principal draftsman of the Revision of Title 28, have avoided or minimized the problem only by construing the motion procedure as a mere prerequisite to habeas corpus (see pp. 8-10, *supra*).

We do not understand the Government to contend that the motion is designed as a mere prerequisite by way of exhaustion of remedies, despite the reference in its brief to cases of that kind (Govt. Br. 81-84). The question may be put concretely: if the respondent were accorded a hearing and were unsuccessful in subsequent proceedings in the district court in the present case, would he be entitled thereafter under the statutory scheme to seek habeas corpus in the district of his confinement? The answer, we believe, is No, for the reasons stated at the outset (*supra*, pp. 10-12); and the Government would apparently agree. It is therefore unhelpful to analogize the statutory plan to the exhaustion of state procedures or administrative remedies. Con-

stitutional problems of suspension would remain if the motion were in fact a prerequisite, since at least delay in recourse to habeas corpus after imprisonment would be involved. The problems are obviously graver under the actual statutory plan.

A. THE CONSTITUTIONAL ISSUE CANNOT BE MET BY RELIANCE ON THE POWER OF CONGRESS OVER THE JURISDICTION OF THE FEDERAL COURTS.

Article I, section 9 of the Constitution provides: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion the public safety may require it." Article III gives undoubted power to Congress to prescribe the jurisdiction and process of the lower Federal courts and the appellate jurisdiction of this Court. If there is a latent conflict here, the debates in the Constitutional convention and the ratifying assemblies failed to resolve it or even to perceive it. See Govt. Brief 62-63.

Fortunately no occasion has arisen in our history for the decision of such an issue. It is true that in *Ex parte Bollman*, 4 Cranch 75, 93, Chief Justice Marshall said that "the power to award the writ by any of the courts of the United States, must be given by written law." But the case involved only the jurisdiction of this Court to award habeas corpus under the Act of 1789 in a cause which the Court had no authority finally to decide. In fact the power was sustained; and the remark of the Chief Justice should be confined to the distribution of authority within the Federal judicial system, for nothing more was at stake. It is also true that in *Ex parte McCardle*, 7 Wall. 509, the repeal of appellate jurisdiction in this Court over cases of habeas corpus was upheld; but again, the jurisdiction of the lower courts to grant the writ had not been disturbed. Indeed, in *Ex parte Yerger*, 8 Wall. 85, the jurisdiction of this Court

to award habeas corpus was maintained by virtue of its original-appellate jurisdiction despite the repeal of the statute authorizing appeals in such cases. It was almost unthinkable that Congress would make no provision for habeas corpus and thus precipitate the question now stirred: "In England, all the higher courts were open to applicants for the writ, and it is hardly supposable that, under the new government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them." 8 Wall. at 95-96.

There must, to be sure, be courts legislatively created before the writ of habeas corpus can be employed. But having established Federal courts Congress would be powerless to deny the privilege of the writ. Otherwise Article I, section 9 would be reduced to a dead letter. The Constitution does not merely prohibit suspension of habeas corpus acts, or of the writ, but of "the privilege of the writ," a privilege long antedating the codification and reforms embodied in English statutes of the seventeenth century—the Petition of Right of 1628 and the Habeas Corpus Acts of 1641 and 1679. See 9 Holdsworth, *History of English Law* 112-125 (3d ed. 1944); Cohen, *Habeas Corpus Cum Causa*, 18 Can. B. Rev. 10, 172 (1940). The vitality of Article I, section 9 cannot be preserved by simply treating it as a limitation on executive rather than legislative suspension. It was precisely the instances of legislative suspension in England that moved the Framers to incorporate the guarantee. Those suspensions, it must be remembered, were not suspensions of the Habeas Corpus Acts but of the privilege of the writ (whether statutory or at common law) in particular classes of cases. See Dicey, Law of the Constitution 225 (8th ed. 1915). Doubtless the most offensive instance was in relation to persons taken in the act of treason on the high seas or in any of the colonies,

to whom the writ was denied by the English Act of 1777, 17 Geo. III, c. 9. See 3 May, *Constitutional History of England* 11-12 (1882); Hurd, *Habeas Corpus* 132 (1858). The Framers did not in Article III let slip the dearly-held guarantee secured in Article I, section 9.

B. THE CONSTITUTIONAL ISSUE IS NOT MET BY RESORT TO THE ENGLISH ACT OF 1679 OR THE PRACTICE IN 1789.

While the Government disclaims as the governing test of constitutionality the practice in 1789, its reliance on the English Act of 1679, 31 Car. II, c. 2, colors much of the argument (Brief 56-57, 74-76). In particular it is maintained that habeas corpus did not lie on behalf of a prisoner convicted by a court of general criminal jurisdiction and that on habeas corpus factual inquiries were not permitted. (*Ibid.*; 76-77). In our view, the governing criterion is not the Act of 1679, which in fact left cases of convicted persons to the common-law writ; the writ was in fact available to prisoners convicted by a court of general criminal jurisdiction and factual inquiries could be made; and the developing use of the writ in the Federal courts has not rested on statutory grant but on a normal exercise of the judicial process.

1. *The English Act of 1679 is not the measure of the constitutional guarantee*

For a number of reasons the precise practice under English law in the seventeenth and eighteenth centuries does not delimit the constitutional guarantee. In the first place, the Act of 1679, principally relied on by the Government, did not mark the full extent of the privilege of habeas corpus even at that time. The common-law writ remained in force and has become the principal source of habeas corpus in England.

The Act of 1679 was designed to remedy certain specific abuses and to that end provided for the grant of the writ

in vacation, prompt return to the writ instead of evasive alias and pluries writs, extension of its territorial scope, and penalties for violation. The statute differentiated between persons held for treason or felony and for lesser offenses; as to the former, the writ guaranteed prompt indictment (sec. 6), and as to the latter, in proper cases, release on bail (sec. 2). It is thus evident that the Act, taken precisely, turns on such matters, irrelevant for our purposes, as terms of court, definitions of felony, and bailable offenses.

But a curious misreading of the Act by early state legislatures in this country, shared by certain commentators and the Government in the present case, has produced a misleading conclusion. The Government states (Brief 74): "For it is clear that at the time of the Constitution habeas corpus was never conceived of as a remedy available to persons convicted by a court of general criminal jurisdiction. The English Act of 1679, 31 Car. II, c. 2, which was in force in England in 1789, expressly excepted '*persons convict or in execution by legal process*' from those eligible to apply for the writ." (Italics added). The italicized words suggest that if a person was convicted by legal, in the sense of lawful, process, he was not eligible to apply for the writ. Actually a misplaced parenthesis has distorted the true reading of the Act. The authentic text reads (Statutes of the Realm, 31 Car. II, c. 2, sec. II):

> "And if any person or persons shall be or stand committed or detained as aforesaid for any Crime unlesse for Treason or Fellony plainely expressed in the Warrant of Committment in the Vacation time and out of Terme it shall and may be lawfull to and for the person or persons soe committed or detained (other then persons Convict or in Execution) by legall Processe or any one [in] his or their behalfe to appeale or complaine to the Lord Chauncellour . . ."

Thus the phrase "legal process," so far from meaning "lawful process" and constituting a criterion for determining which convicted persons were and which were not entitled to seek the writ, was a term of inclusion (probably in contradistinction to private restraint); and convicted persons were wholly excepted from the section, leaving their rights to be worked out through the common-law writ. The section itself deals with bail, which would normally not be the object of persons seeking the writ after conviction. At the close of the section it is provided that release on bail shall be granted, having regard to the "quality of the prisoner and the nature of the offence," to secure his appearance at the next session of the Kings Bench or Assizes—

> "unlesse it shall appeare unto the said Lord Chauncellor or Lord Keeper or Justice or Justices [or] Baron or Barons that the Party soe committed is detained upon a legall Processe Order or Warrant out of some Court that hath Jurisdiction of Criminall Matters or by some Warrant signed and sealed with the Hand Seale of any of the said Justices or Barons or some Justice or Justices of the Peace for such Matters or Offences for the which by the Law the Prisoner is not Baileable."

This latter provision, introducing the concept of a court of general criminal jurisdiction, is not free from ambiguity; it excepts from the privilege of bail either those held by a warrant of such a court or those held by such a warrant for a nonbailable offense. In either case it has no bearing on the rights of one whose trial is behind him and who seeks discharge or a new trial through the common-law writ.[8]

Moreover, the grounds for habeas corpus in England cannot be equated with our own without ignoring funda-

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[8] "The writ in modern times is almost invariably issued by virtue of the common law jurisdiction, and not under the statute." 10 *Laws of England* 44, note h (Halsbury ed. 1909); 9 *Halsbury's Laws of England* (1933) 707, note u. It has been said that the statute is not applicable in term time. *Hobhouse's Case*, 3 B. & Ald. 420, 425.

mental constitutional differences stemming largely from our judicially enforced Bill of Rights and the subordination of the legislature to judicial review. In England, for example, it has been held that habeas corpus will not lie to test the validity of imprisonment by order of a House of Parliament for contempt of that body. *Case of the Sheriff of Middlesex*, 11 Ad. & El. 273. Compare the unquestioning exercise of habeas-corpus jurisdiction by our courts in such a case. *Jurney* v. *McCracken*, 294 U. S. 125.

Finally, and most important, the English practice was an evolving one, under continuous judicial and Parliamentary re-examination, and subjected to a series of liberalizing reforms by courts and legislature both before and after 1789. See 9 Holdsworth, *History of English Law* 112-125 (3d ed. 1944); Cohen, *The Writ of Habeas Corpus Cum Causa*, 18 Can. B. Rev. 10, 172; Hallam, *Constitutional History of England* 500-502 (5th ed. 1867). Changes were constantly pressed and were delayed by the House of Lords and by the assurances of the judges that judicial power would prove adequate. *Ibid.*; see the questions addressed to the Judges by the House of Lords and the answer of Wilmot, J., in 1758 in Wilmot, *Notes of Opinions* 77-129. Certain legislative provisions were enacted in 1816, 56 Geo. III, c. 100, but these related only to non-criminal cases. Against this background of flux and empiric responsiveness, it would be mistaken in the extreme to try to capture the state of the law at a moment of time and identify it with the guarantee in the Constitution. No such fallacy has crept into this Court's treatment of comparable guarantees, such as the right to the assistance of counsel and freedom of the press. *Johnson* v. *Zerbst*, 304 U. S. 458; *Near* v. *Minnesota*, 283 U. S. 697; cf. *Funk* v. *United States*, 290 U. S. 371. We shall have to look to history for the essentials of the Great Writ, but not to one point in that history for its accidents. In that sense it is fair to say of seventeenth and eighteenth century

lawmakers that we do not sit in their councils; we invite them to sit in ours. Cf. Curtis, *Lions Under the Throne* 2 (1947).

2. *The common-law writ was available to a convicted prisoner and permitted factual inquiry*

The availability of habeas corpus to one convicted by a court of general criminal jurisdiction was established at least as early as 1670, by the decision in one of the most revered cases in Anglo-American law. *Bushell's Case*, Vaughan 135, 6 St. Tr. 231. Bushell, it will be recalled, had been sentenced for contempt as a juryman at the Old Bailey; he secured his discharge on habeas corpus from the Court of Common Pleas. The Act of 1679 left this ruling unaffected; as we have seen, it simply excepted cases of convicted persons from the statutory provisions relating to release on bail. Two centuries later we find the principle of Bushell's Case alive and extended. In *In re Authers*, 22 Q. B. D. 345 (1889), Coleridge, C.J., and Hawkins, J., joined in granting habeas corpus to a prisoner whose conviction had been affirmed on appeal to quarter sessions, where it appeared that the conviction was not supportable as one for a second offense. See also *Souden's Case*, 4 B. & Ald. 294; *King* v. *Hawkins*, Fortes. 272.

The same cases indicate that factual inquiries were permissible on habeas corpus. In *In re Authers, supra*, affidavits were taken; and in *Bushell's Case* Chief Justice Vaughan distinguishes the case of a prisoner held for trial from that of one already convicted. The objection to a factual inquiry in the first case is that it tends to anticipate the province of the jury, so long as a prompt trial is assured, while in the second case the opportunity must be given on habeas corpus or not at all. Vaughan, 142-143.

Similarly Wilmot advances as an objection to controverting the return that the issue ought to be tried by a jury—an objection not compelling after final judgment. Wilmot, *supra*, at 122-123. That the return might be confessed and avoided by other facts was laid down in Hawkins, Pleas of the Crown, Bail, secs. 78-79, and Bacon, Abridgment, Habeas Corpus, B, 11. Somewhat more liberality appears to have been shown in permitting actual controversion of the return in cases of impressment than in criminal cases. A careful student of the subject has thus summed up the common-law practice: "The result is that in cases of commitments for crime or supposed criminal matters, it is impossible to specify those in which the truth of the return could be controverted, and in all others it is impossible to specify those in which it could not." Hurd, Habeas Corpus 277 (1858).

When the critical distinction between pre-trial and post-trial cases is kept in mind, it is evident that the resources of the common-law practice were adequate, without legislation, to examine into facts tending to vitiate a conviction or sentence. This conclusion is highly important when we turn to consider the source of such power in the Federal courts.

3. *The authority of the Federal courts to vindicate constitutional rights on habeas corpus does not stem from Congressional grant of power.*

The first Judiciary Act, after distributing judicial power in the hierarchy of Federal courts, provided (Act of Sept. 24, 1789, c. 20, sec. 14, 1 Stat. 73):

> "That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the

exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the same authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

Thus the nature and grounds of the writ were left to be determined by the courts. "No law prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it. The term is used in the constitution, as one which was well understood. . . ." Marshall, C.J., in *Ex parte Watkins*, 3 Pet. 193, 201. Only the problem of Federalism was resolved by Congress, in preventing the use of the writ on behalf of state prisoners; this problem was a distinct one, left for the guarantees of state constitutions.

The development in the availability of the writ has proceeded from cautious beginnings in the Federal courts, but the evolution has been faithful both to the essential nature of the writ and to the best traditions of the judicial process. The cautious beginnings are exemplified in the leading case of *Ex parte Watkins*, *supra*, where a prisoner sought habeas corpus in the Supreme Court after conviction in a Federal circuit court, apparently on the ground that the indictment stated no offense or none cognizable in the particular circuit court. Several factors conspired to produce a decision denying the writ. First, the application was made to the Supreme Court, which had no original jurisdiction in the case and no appellate jurisdiction in criminal cases. Second, the Court tended to assimilate

the case to one under the English Act of 1679, stating: "This statute may be referred to, as describing the cases in which relief is, in England, afforded by this writ to a person detained in custody." 3 Pet. at 202. It was then easy to point out that persons convicted by the judgment of a court were not within the Act, and to make the case turn on whether the judgment was a "nullity." This approach overlooked the fact that the Act of 1679 left all convicted persons to the common-law writ, that the exclusion related to release on bail, and that in any event the Act apparently applied only to applications in vacation time. See pp. 30-32, *supra*. Third, the Court identified the problem with that of an action for false imprisonment, *id.* at 203, ignoring the fact that in *Bushell's Case*, 1 Mod. 119, an action for false imprisonment was denied although in *Bushell's Case*, Vaughan 135, habeas corpus had been granted to the same petitioner.

While retaining the bridgework of such concepts as "void," "nullity," and "without jurisdiction," this Court gradually recognized the historic potentialities of the writ. In *Ex parte Lange*, 18 Wall. 163, habeas corpus was granted where the prisoner had paid a fine and begun a term of imprisonment, and the trial court during the term had remitted the fine and sentenced him to imprisonment only, the statute authorizing only one or the other. The court admittedly had jurisdiction to decide the criminal case and impose sentence; but Mr. Justice Miller observed that after the fine had been paid "The power of the court to punish further was gone." 18 Wall. at 170. This process of reasoning, familiar enough in the "principles and usages of law," was carried further in *Ex parte Siebold*, 100 U.S. 371, entertaining habeas corpus to challenge the validity of the statute under which the prisoner had been convicted. The opinion of Mr. Justice Bradley returns to first princi-

ples. After noting the distinction taken between erroneous and void judgments, he said (p. 376):

> "It is stated however, in Bacon's Abridgment, probably in the words of Chief Baron Gilbert, that, 'if the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge.' Bac. Abr., Hab. Corp., B. 10."

If there is inserted in this quotation the clause "or by a process whereby no man ought to be punished" if would serve admirably to describe the grounds for habeas corpus today. The evolution from "lack of jurisdiction" owing to invalidity of the criminal statute to "loss of jurisdiction" owing to fundamental vices in the procedure is too familiar to recount. *Johnson* v. *Zerbst*, 304 U.S. 458; see Notes, 35 Col. L. Rev. 404; 61 Harv. L. Rev. 657.

But, it is said, this development was not implicit in the basic writ but stems from a new seed planted by Congress in the Act of February 5, 1867, 14 Stat. 385, c. 28. That Act gave power to the Federal courts to grant the writ "where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States," and authorized appeals to the Supreme Court. The object of the Act was to protect Federal officials who might be imprisoned through hostile state action, and it was an "ironic stroke" that its appeal provision was early invoked by a prisoner seeking release from federal confinement under the Reconstruction Acts themselves. See 2 Warren, *Supreme Court in United States History* 465 (rev. ed. 1926). At all events, the Act did not transform the conception of habeas corpus for federal prisoners. It was not even mentioned in the *Siebold* case. Mr. Justice Bradley relied not on the Act of 1867 but on Chief Baron Gilbert and Matthew Bacon and Chief Justice Vaughan.

The Act of 1867 also provided that the petitioner might deny any facts set forth in the return, or allege others, and that the court should determine the facts in that event. As we have seen, pages 34-35, *supra*, the courts needed no legislative grant thus to administer the writ.

C. THE ESSENTIALS OF HABEAS CORPUS ARE LOST IN THE MOTION PROCEDURE UNDER SECTION 2255

The ultimate question is whether in the aggregate the departures in the motion procedure from the traditional concept of habeas corpus so transform the historic writ as to constitute a suspension of it. A suspension can be wrought as well by cumulative inroads as by a dramatic stroke; the liberty of the subject can be lost by erosion no less than by avulsion. It must be remembered that the problem is not simply whether a substitute has been provided which would satisfy the due process clause of the Fifth Amendment. So to view the problem would ignore the central fact that the Constitution contains a habeas corpus clause. Nor is the problem met by reference to the privilege of appeal from criminal convictions. The attacks on convictions with which we are concerned involve matters outside the record of the criminal trial. Nor will it do to suggest that certain constitutional challenges which this Court has held to be appropriate on habeas corpus are more fundamental than others, for Section 2255 does not purport to be separable, and any distinctions based on degrees of constitutional vices would introduce new and unwanted complexities in the procedure.

What are the essentials of habeas corpus and how does the motion procedure affect them? The writ is a peremptory remedy, issued as of right where the application (taken together with the petitioner's traverse to the return) is not "palpably unmeritorious." *United States ex rel. McCann v. Adams*, 320 U. S. 220, 221. It is a remedy which is not

exhausted by a single adjudication and denial. *Salinger* v. *Loisel*, 265 U. S. 224; *Eshugbayi Eleko* v. *Government of Nigeria* [1928], A. C. 459. The principle of repose gives way to the recognition that it must never be too late to discover the truth which would set free a prisoner confined for a cause for which no man should be restrained or by a process whereby no man should be convicted.

Examined in the light of these essentials the motion procedure is seen to be a mere shadow of the great writ. The standards governing the production of the prisoner are at best confused and uncertain. Whether there is any process for bringing him in, whether his presence depends on the cooperation of the Government, whether the standards are those of convenience or some other criterion short of the traditional criteria on habeas corpus, are questions left unresolved by the statute. The practice under it, as has been seen, makes it abundantly clear that the courts do not regard it as simply a change of venue in habeas corpus. See pp. 19-20, *supra*. The failure of the statute to refer to standards applicable in habeas corpus, to refer to the production of the prisoner save by encouragement not to produce him, or to specify a time within which the Government must make return cannot but transform the atmosphere as well as the procedure. As the court below observed, and as the available evidence indicates, the time consumed between the filing of a motion and its disposition can hardly fail to be greater than the ordinary interval in habeas corpus.[9] If, after denial of the motion, appeal to the court of appeals, and a petition for certiorari, the prisoner is perchance allowed to seek habeas corpus on the ground that the motion procedure was inadequate the writ has been effectively suspended for what may easily be one hundred

[9] See Memorandum cited in note 5, *supra*.

times the historic three-day period within which, since the English Act of 1679, the custodian is normally obliged to make a return.

Other opportunities provided on habeas corpus are apparently denied under the motion procedure. There is no provision for bail on appeal comparable to that which governs on appeal from the discharge of a writ of habeas corpus or on appeal from the granting of the writ. Cf. Rules of the Supreme Court, Rule 45. The *in forma pauperis* provisions have not been made applicable to the motion. Fees for transcripts furnished in criminal or habeas corpus proceedings to persons allowed to sue, defend or appeal *in forma pauperis* are to be paid by the United States. 28 U. S. C. Section 753(f). This has not been made applicable under Section 2255. Likewise, on habeas corpus a petitioner *in forma pauperis* is entitled to be furnished certified copies of relevant documents or parts of the record. 28 U. S. C. Section 2250. Despite the proximity of this section to 2255, and their common background, no similar provision is carried into the latter section.

A similar divergence between the habeas corpus sections and Section 2255 obtains with respect to the res judicata effect of a denial of the application. Section 2244, dealing with habeas corpus, provides:

> "No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry."

This section was drafted after the most careful and critical scrutiny by the Judicial Conference and its Committee. The phrase "and the judge or court is satisfied that the ends of justice will not be served by such inquiry" was inserted after a persuasive and eloquent statement by three members of the Committee, Judges A. L. Stephens, Underwood, and Wyzanski. See Government Brief, App. 154. That statement urged that without the quoted phrase the procedure would not be within the spirit of the constitutional provision against suspension of the writ. We venture to quote from that statement for its bearing not only on the precise issue of finality of determination but for its relevance to the whole case:

> "Even the quite aggravating and indefensible practice of 'peddling' unmeritorious petitions of the same content around to different judges, after adverse rulings, does not afford a sufficient reason for irretrievably shutting off this historic writ of freedom with one court decision. Unjust and illegal imprisonment, by decree of court, despotic rulers, committees of citizens, or by scheming individuals, has been and continues to be a prime unatonable crime of man, causing unjust suffering and tragedy. No trouble or inconvenience to officials of our government, or cost to it, can justify the withdrawal of the right to a free, open and adequate official investigation into an imprisonment where the prisoner or someone for him asserts, as facts, statements which, if true, would establish its illegality. We venture to assert that there is no duty of a judge that transcends in importance the entertainment of the writ of habeas corpus. . . . That the writ may have been denied for the lack of proof and a witness to supply the lack becomes available perhaps years later makes no difference. A corrupt, vindictive or vicious man, a callous jailor, a careless or erring judge, a thousand combinations of circumstances, may cause the one and only petition allowable to fail."

The statement of these judges protested against a draft which would have precluded a judge from entertaining a second or subsequent application for habeas corpus where no new ground was presented. Faced with this background, the drafters of Section 2255 elected not to employ the standard which the Judicial Conference was persuaded to embody in the habeas corpus provision. At the time of the consideration by the Conference, the bill dealing with the motion procedure contained no provision for finality. When the matter came to be incorporated in the revision of Title 28 the provision adopted was this: "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." Thus it appears that if a prisoner is obliged to follow the motion procedure stricter standards of finality govern than if he were permitted to apply for habeas corpus. It is doubtful, under the language of the provision, whether an appellate court could reverse the sentencing court for failure to entertain a second motion, since the court "shall not be required" to entertain a successive motion.

Of course the procedure on habeas corpus is subject to regulation within limits. It has been so regulated in sections 2241-2254. But the cumulative effect of the departure in section 2255 is such that where the motion procedure applies the vitals of habeas corpus have been removed.

In making this submission, we are not unmindful of the problems raised by frivolous and multiple petitions. These problems have been attacked by the procedural provisions of sections 2241-2254. In particular it is now made clear that the sentencing judge may simply file a certificate with the habeas corpus court setting forth the facts occurring at the trial. Section 2245. Evidence may be taken orally or by deposition or by affidavit; in the latter event the parties have the right to propound written interrogatories or to file

answering affidavits. Section 2246. A rule to show cause may be issued before determining whether the writ should issue. Section 2243. The provision for court reporters should go far to obviate factual disputes regarding the conduct of the trial. Section 753. The denial of habeas corpus, while not conclusive, is entitled to great weight in the consideration of successive applications. *Salinger* v. *Loisel*, 265 U. S. 224.

What is wanted, clearly, is a procedure which will deter irresponsible applications and provide for their expeditious disposal while not placing impediments in the way of genuine complaints. If the procedural provisions for habeas corpus are not adequate to this end, other measures can doubtless be devised without impairing the function of the writ. Prosecutions for perjury stand open to the Government. There might even be considered a measure to provide legal advice to federal prisoners, much as medical and spiritual advisers are now provided. But the motion procedure is calculated to stimulate the very irresponsibility that reforms should discourage. The procedure puts a premium on the inventiveness of prisoners by holding out the prospect of a longer journey away from prison if the allegations are sufficiently impressive.

It would therefore cause no breakdown in the effort to meet the problems of habeas corpus if the motion procedure were to be held invalid.[10] Cf. Note, *Section 2255 of the Judicial Code: The Threatened Demise of Habeas Corpus*, 59 Yale L. J. 1183 (1950). An opportunity would be afforded for further legislative consideration in the light of this

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[10] While "the motions under the statute have continued to mount," as Judge Denman states (R. 49), no decline in *habeas corpus* petitions is observable. In the three fiscal years just prior to the effective date of section 2255 in 1948, the numbers of such petitions by Federal prisoners were 379, 393, and 506, respectively. In the three fiscal years following, they were 481, 409, and 399, respectively. Speck, 10 Ohio St. L. J., *supra* note 5, Table I, and Memorandum of October 3, 1951.

Court's decision. Meanwhile this Court would have vindicated the principle that when faced with a whittling down of the liberty of the citizen the only safe course is *obsta principiis*.

CONCLUSION

For the reasons stated the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

PAUL A. FREUND,
Counsel for Respondent.

APPENDIX A

Article I, Section 9, clause 2, of the Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.

28 U. S. C. 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

APPENDIX B

79th Congress 1st Session

H. R. 4233

In the House of Representatives

October 1, 1945

Mr. Sumners of Texas introducted the following bill; which was referred to the Committee on the Judiciary

A BILL

To regulate the review of judgments of conviction in certain criminal cases

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity of imprisonment of a prisoner held in custody pursuant to a conviction of a court of any State, or to release such prisoner in any habeas corpus proceed-

ing, unless it shall appear that the petitioner has no adequate remedy by habeas corpus, writ of error coram nobis, or otherwise in the courts of the State. Where a prisoner in custody pursuant to a conviction of a court of any State, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States, who has no adequate remedy in a State court by habeas corpus, writ of error coram nobis, or otherwise files a petition for writ of habeas corpus before any circuit or district judge of the United States, such judge shall determine whether there is reasonable ground for the issuance of the writ, and, if so, shall issue the writ and shall cause a court of three judges to be constituted as provided by section 266 of the Judicial Code, as amended (28 U. S. C. 380a), who shall constitute a special court for the hearing of such petition. The decision of such court shall be reviewable by the Supreme Court of the United States on writ of certiorari. If the judge to whom application for the writ is made shall determine that there is no reasonable ground for issuing it, he shall dismiss the petition from which action an appeal shall lie to the circuit court of appeals for the circuit, upon the filing of the certificate required by the Act of March 10, 1908 (ch. 76), entitled "An Act restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings, as amended" (35 Stat. 40, 28 U. S. C. 466). The phrase "no adequate remedy" as used in this section means absence of State corrective process or existence of exceptional circumstances rendering such process unavailable to protect the rights of the prisoner.

SEC. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States, or that the court was without jurisdiction, or that the sentence was in excess of the maximum prescribed by law or otherwise open to collateral attack, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration

of the term at which such judgment was entered. Such court shall thereupon cause notice of the motion to be served upon the United States attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was in excess of the maximum prescribed by law or otherwise open to collateral attack, or that there were errors in the sentence which should be corrected, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the circuit court of appeals. No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons. Where the prisoner has sought relief on such a motion, if the circuit or district judge concludes that it has not been practicable to determine the prisoner's rights on such motion, the findings, order, or judgment on the motion shall not be asserted as a defense to the prisoner's application for relief on habeas corpus. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia.

H. R. 6723, 79th Congress, 2d Session

In the House of Representatives

June 10, 1946

Mr. Sumners of Texas introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

to regulate the review of judgments of conviction in certain criminal cases

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity, under the Constitution, treaties, or laws of the United States, of imprisonment of a prisoner held in custody pursuant to a conviction of a court of any State, or to release such prisoner in any habeas corpus proceeding, unless it shall appear that the petitioner has no adequate remedy by habeas corpus, writ of error coram nobis, or otherwise in the courts of the State. The phrase "no adequate remedy" as used in this section means absence of such State corrective process or existence of exceptional circumstances rendering such process ineffective to protect the rights of the particular petitioner. An appeal shall lie to the circuit court of appeals from an order of discharge or, upon the filing of the certificate required by the Act of March 10, 1908 (ch. 76, 35 Stat. 40; 28 U. S. C. 466), from an order denying discharge.

SEC. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution, treaties, or laws of the United States, or that the court was without jurisdiction, or that the sentence was in excess of the maximum prescribed by law or otherwise open to collateral attack, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate

or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. Unless such court shall determine that the motion presents no ground for the relief sought, it shall thereupon cause notice of the motion to be served upon the United States attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was in excess of the maximum prescribed by law or otherwise open to collateral attack, or that there were errors in the sentence which should be corrected, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the circuit court of appeals. No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons. Where the prisoner has sought relief on such a motion, if the circuit or district judge concludes that it has not been practicable to determine the prisoner's rights on such motion, the findings, order, or judgment on the motion shall not be asserted as a defense to the prisoner's application for relief on habeas corpus. Any motion under this section shall be filed within one year (a) after the effective date of this Act, or (b) after the discovery by movant of facts upon which he relies for relief, or (c) after any change of law, by statute or controlling decision, occurring subsequent to imposition of sentence and upon which he relies for relief. The burden of establishing that the motion was timely filed shall be upon movant; and failure to file such motion within such time shall bar relief by the

writ of habeas corpus unless it appears that it would not have been practicable to determine petitioner's rights to discharge from custody on such motion if the motion had been filed in time. The process of the court wherein such motion is filed may be served at any place within the jurisdiction of the United States. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia.

79th Congress, 2d Session

H. R. 7124

* * * * * * *

§ 2244. Finality of determination; rehearing

No circuit or district judge shall entertain an application for a writ of habeas corpus to inquire into the detention of any person if it appears that the legality of such detention has been determined on a prior application for a writ of habeas corpus and the application presents no new grounds.

A new ground within this section may include a material change in applicable law subsequent to the prior determination.

The court or judge denying or dismissing an application for a writ of habeas corpus or making a final order adverse to the petitioner may for good cause grant a rehearing at any time.

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court shall determine that the sentence imposed was unlawful or erroneous, it shall grant the prisoner appropriate relief which may include vacation or correction of the sentence, release or resentencing of the prisoner or the granting of a new trial.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.